

DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, Judge

CACR05-1189

May 3, 2006

BRANDON ANTOIN BURRIS
APPELLANT

APPEAL FROM LITTLE RIVER
COUNTY CIRCUIT COURT
[NO. CR-2003-94]

v.

STATE OF ARKANSAS

HONORABLE TED CAPEHEART,
CIRCUIT JUDGE

APPELLEE

AFFIRMED

Brandon Antoin Burris was convicted by a jury of first-degree murder and aggravated robbery and was sentenced to twenty-five years and ten years, respectively, with the sentences to be served consecutively. Burris appeals, arguing that the trial court erred in (1) denying his motion to suppress his confession because he was intoxicated at the time he gave the statement and the arresting officers used threats and intimidation; (2) failing to require the State to elect a single count on which to try him because his actions constituted a “continuing course of conduct”; and (3) denying his motion for directed verdict on the aggravated-robbery charge because there was insufficient evidence to corroborate his confession. We affirm.

On October 18, 2003, the body of Robert Thompson was discovered in his home by his daughter. Thompson had been stabbed to death in his bed. During the ensuing investigation, the police spoke with confidential informants who indicated that Burris had been seen at the residence earlier and that he was seen later in the evening with blood on his pants. The police soon learned that Burris had an outstanding misdemeanor warrant for failure to appear in district court and arrested him.

Following his arrest, Burris was questioned about Thompson's murder. Burris first signed a waiver of his *Miranda* rights and then consented to an interview with Special Agent Shannon Shepherd of the Arkansas State Police and Lieutenant Jessie Ricks of the Little River County Sheriff's Department.

Burris told Shepherd and Ricks that he first went over to Thompson's house around 10:30 p.m. on October 17, 2003, and purchased twenty dollars of crack cocaine. He then went to his friend Billy Roe's house, where they smoked the rock. At around 12:30 a.m., Burris went back to Thompson's house and purchased more crack cocaine. Burris returned to Roe's, and the two proceeded to smoke the rocks. Burris stated that after they finished, he wanted some more, but that he did not have any more money.

Burris stated that the battery on his truck had gone dead, so between 1:00 and 1:30 a.m., he walked back to Thompson's house, after first retrieving a kitchen knife from his truck. Burris said that when he reached Thompson's front yard, he was thinking "I wanted more dope and get money." After he knocked on the door, Thompson answered and Burris entered; the two exchanged greetings and when Thompson sat down on his bed, Burris rushed him "real quick and had him pinned down." Burris then pulled out his knife and stabbed Thompson in the eye. He then stabbed him in the chest close to the heart and continued to stab him.

Burris went on to confess that after stabbing Thompson in the eye, Thompson told him to "get what you want," but that he thought "if I don't wound him he would know who I am and I'm still going to jail so I might as well finish the job." He stated that Thompson started "hollering" after he was stabbed the third time, so he put a pillow over Thompson's face and continued stabbing him until he stopped breathing and moving his arms and legs.

Burris said that afterwards, he searched through Thompson's belongings and found a pill bottle full of crack cocaine and two wallets containing about \$120. Burris then walked back to Roe's house, and on the way, he threw the knife and the two empty wallets into a burned-out house. Burris said that he stayed up all night doing the crack and that he had done some that day. Burris admitted

that he had washed the jeans he had on, but said that he did not wash the shirt, and that he was wearing the same shirt and shoes that he wore when he stabbed Thompson. Later DNA analysis of the blood stains on the shirt matched Thompson's profile. When asked when he decided to kill Thompson, Burris replied that he did so while he was standing in Thompson's front yard because he knew that, otherwise, Thompson could identify him.

Dr. Stephen Erickson, a medical examiner, performed the autopsy and determined that Thompson died of multiple stab wounds to the chest. Thompson suffered a total of thirty-eight stab wounds to the chest and two superficial stab wounds to the face. The fatal wounds were consistent with the knife found in the burned-out home that Burris directed the police to.

At the hearing on Burris's motion to suppress his confession, Shepherd testified that Burris did not seem to have trouble understanding the conversation during the interview, and that no law enforcement officer offered Burris any inducements or benefits or intimidated him in anyway. Shepherd did admit that Burris probably knew he was a suspect rather than a witness because before the interview, Shepherd stated that he believed he knew what happened but he wanted to hear it from Burris. Shepherd also stated that after the taped interview concluded, Burris asked what was going to happen to him, and Shepherd replied that it depended on what charges the prosecutor filed, but that he could get anything from jail time to the death penalty.

Ricks testified that he knew Burris well and that he did not believe Burris was intoxicated during the interview. He stated that Burris had one unopened can of beer in his pocket when he was arrested and that he did not recall Burris saying that he had smoked crack cocaine or marijuana on the day of the statement. Ricks also confirmed that the prospect of Burris receiving the death penalty was not discussed until after Burris had made his statement. The trial court denied the motion to suppress the confession, finding that Burris appeared to be conscious of everything he was doing during the interview and that it seemed as though he was in charge of all of his faculties.

During the trial, Burris testified that he went back to Thompson's house to get some more crack cocaine on credit. He claimed that Thompson refused and that an argument ensued. Burris

stated that he did not get on top of Thompson until Thompson reached for his gun. Burris stated that he had been in Thompson's bedroom numerous times and that he knew Thompson always kept loaded guns by his bed; he stated that he felt threatened and he believed Thompson would kill him if he did not protect himself. Burris recanted his previous confession, stating that he was high at the time he gave the statement and that the drugs were "talking for him." He stated that he never planned to rob or kill Thompson and that he had even forgotten that he had the knife with him.

The trial court denied the defense's request to require the State to elect first-degree murder or aggravated robbery based upon the continuing course of conduct and also denied a motion for a directed verdict of not guilty on the aggravated robbery charge because there was not enough evidence to sustain a conviction under the corpus delicti rule.

This court considers challenges to the sufficiency of the evidence before we address other allegations of trial error. *Hunter v. State*, 300 Ark. 198, 952 S.W.2d 45 (1997). Therefore, we will first discuss Burris's argument that there was inadequate evidence to convict him of aggravated robbery because corroboration of his confession was insufficient to establish the corpus delicti of the offense. A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence, and the test on appeal is whether there is substantial evidence to support the verdict. *Ware v. State*, 348 Ark. 181, 75 S.W.3d 165 (2002). Substantial evidence is evidence of sufficient certainty to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002).

Under the corpus delicti rule, a confession will not warrant a conviction unless it is accompanied by other proof that the offense occurred, and the State must prove (1) the existence of an injury or harm constituting a crime and (2) that the injury or harm was caused by someone's criminal activity; it is not necessary to establish any further connection between the crime and the particular defendant. *See, e.g.*, Ark. Code Ann. § 16-89-111 (Repl. 1997); *Ware, supra*; *Tinsley v. State*, 338 Ark. 342, 993 S.W.2d 898 (1999).

In the case of aggravated robbery, the corpus delicti rule requires the State to prove that the accused intended to commit felony or misdemeanor theft and either employed or threatened to employ the use of deadly force. *Alexander, supra*. These elements may be shown by strong and unequivocal circumstantial evidence such as to leave no ground for reasonable doubt; thus, where there is some proof of the corpus delicti, the weight and sufficiency is properly left to the jury. *Id*; see also *Jenkins v. State*, 348 Ark. 686, 75 S.W.3d 190 (2002).

Here, the State only had to prove that the crime of aggravated robbery occurred. Contrary to Burris's assertion, there is ample evidence to corroborate his confession that he committed aggravated robbery. Specifically, Burris stated that he retrieved the knife from his truck while en route to Thompson's house and admitted that he developed the idea of robbing Thompson while standing outside of the house; the evidence showed that Burris carried that idea to fruition by using deadly force. In addition, the police recovered the murder weapon and the stolen wallets in the exact location where Burris indicated that he had discarded them. In sum, Burris's acts and confession, coupled with the jury's right to reject Burris's claim that he only attacked Thompson in self-defense, constitute substantial evidence to establish that Burris had the requisite intent to commit theft and that he was armed with a deadly weapon while accomplishing his intention.

For his next point on appeal, Burris asserts that the trial court erred in refusing to suppress his confession, claiming that he was intoxicated at the time he made the statements and also that the officers used intimidation by threatening him with the death penalty.

In cases involving the trial court's ruling on the voluntariness of a confession, the appellate court makes an independent determination based upon the totality of the circumstances, and the ruling will only be overturned if it is clearly against the preponderance of the evidence. *Grillot v. State*, 353 Ark. 294, 107 S.W. 3d 136 (2003).

Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in a significant manner; such questioning requires the employment of certain procedural safeguards to protect the privilege against

self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A person may waive his *Miranda* rights, including the right to remain silent and the right to have an attorney present, if the waiver is made voluntarily, knowingly, and intelligently. *Id.*

A custodial statement is considered presumptively involuntary, and the State has the burden to prove by a preponderance of the evidence that the statement was voluntarily, knowingly, and intelligently made. *Flowers v. State*, --- Ark ---, --- S.W.3d--- (May 5, 2005). When reviewing the voluntariness of the waiver of *Miranda* rights, the court looks at whether the statement was the product of “free and deliberate choice rather than intimidation, coercion, or deception.” *Id.* To make this determination the court assesses the totality of the circumstances surrounding the waiver and looks at such factors as “age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant.” *Id.* The appellate court will defer to the trial judge’s credibility determinations, as the trial judge is in the best position to evaluate the reliability of the witnesses. *Id.*

The fact that a defendant might have been under the influence of drugs or alcohol at the time a statement is given is not, of itself, sufficient to invalidate a confession. *Everett v. State*, 316 Ark. 213, 871 S.W.2d 568 (1994). Whether an accused was so incapacitated from drugs or alcohol that he could not make an intelligent waiver of his rights is a question of fact to be resolved by the trial court, and the test is whether the accused had sufficient mental capacity at the time of his statement to know what he was saying and to have voluntarily intended it. *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992).

In *Davis*, *supra*, our supreme court affirmed the trial court’s refusal to suppress appellant’s confession even though appellant had a blood alcohol level over the legal limit, where officers testified that appellant understood the meaning of his statement, walked into the police station without assistance, answered questions without any indication of mental disabilities, and

remembered details about the incident. Similarly, in *Everett, supra*, our supreme court found no error in the trial court's denial of a motion to suppress appellant's inculpatory statements where appellant testified that he was under the influence of drugs and alcohol at the time of the interrogation, but the detective testified that appellant did not appear to be under the influence of intoxicants and did not display any erratic or unusual behavior.

In the present case, Burris claims that he was under the influence of alcohol, marijuana, and crack cocaine when he gave his statement to the police. However, both Shepherd and Ricks testified that Burris did not appear to be under the influence of either drugs or alcohol at the time of his statement. In fact, Ricks testified that he knew Burris well. Also, the trial court had the opportunity to listen to Burris's taped statement and concluded that Burris was conscious of what he was saying and seemed to be in charge of all of his faculties at the time of the confession.

Burris also claims that he was intimidated into giving a statement because the officers threatened him with the death penalty. Burris, however, had the burden of demonstrating that the actions of the police had a particular effect upon him. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). The nexus between the conduct of the police and the statement given by the accused must be established; in other words, there must be an essential link between the coercive activity of the officer and a resulting confession by the accused. *Id.* Courts cannot speculate as to the defendant's motivation for speaking or acting without some sort of indication from the defendant himself, and the proper inquiry is whether the defendant's will has been overborne or his capacity for self-determination critically impaired. *Id.*

In *Standridge, supra*, our supreme court found no error in the trial court's denial of a motion to suppress where appellant claimed that he was too emotional at the time of his statement and that the police officer knew that persons charged with violence towards minor children have a difficult time in incarceration. The court stated that (1) the fact that appellant might have been emotional was probably more attributable to the fact that he was in jail rather than any coercion and that (2) the police officer in question testified that, while he had been told that people charged with offense

against children are low on the totem pole as far as prisoners go, he had no actual knowledge of how people charged with offenses against minors are treated by fellow inmates. *Id.*

Similarly, in *Flowers, supra*, appellant asserted that he did not give a voluntary, knowing, and intelligent waiver of his *Miranda* rights because he had been coerced and threatened by the police. After looking at the totality of the circumstances, the court found that appellant was aware of what he was saying when he gave the statement and that appellant's testimony that police officers threatened to kill his daughter and arrest his mother was simply not credible. *Id.*

Here, Burris could not establish that he confessed to the murder because his interviewers threatened him with the death penalty. In fact, from the interview, it appears that Burris confessed without any urging or coercion; Shepherd simply told Burris that they wanted to discuss the incident that occurred at Thompson's house and that Burris could begin by describing his day. Also, both Shepherd and Ricks testified that the only time the death penalty was mentioned was after Burris had confessed, the interview was concluded, and Burris asked what would happen to him.

Burris's final argument on appeal is that the trial court erred in failing to require the State to elect a single count on which to try him. Burris claims that his actions constitute a "continuing course of conduct" and, thus, convictions for both offenses violate his double jeopardy rights as contained in the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, § 8 of the Arkansas Constitution. This argument must also fail.

A defendant may be prosecuted for each offense when the same conduct of the defendant can establish the commission of more than one offense; however, the defendant may not be convicted of more than one offense if the "conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted." Ark. Code Ann. § 5-1-110 (a) (5) (Repl. 1997). A continuing offense, which may be prosecuted only under one charge, is a continuous act or series of acts set on foot by a single impulse and operated by an unintermittent force. *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999). The test for determining if a situation involves a continuing offense is whether the individual acts are prohibited so that each act

is punishable separately, or the course of action which they constitute is prohibited so that there can be but one penalty. *Id.*

We note that § 5-1-110 of the Arkansas Code does not prohibit the State from initially seeking multiple convictions; however, under certain specified circumstances, a judgment of conviction may only be entered for one offense. *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993). Under this theory, Burris could only receive relief after moving to limit the judgment of conviction to only one offense, and not by prematurely moving to require the State to elect only one offense with which to charge him.

In any event, the court did not violate the constitutional ban against double jeopardy because Burris's conduct constituted a clear violation of two separate statutes. First-degree murder and aggravated robbery are covered by separate statutes, each prescribing its own punishment. *See generally* Ark. Code Ann. § 5-10-102(a) (Repl. 1997); Ark. Code Ann. § 5-12-103(a) (Repl. 1997). In addition, the legislature has clearly expressed its intent to permit multiple punishments for defendants who commit first-degree murder accompanied by an underlying crime. *See* Ark. Code Ann. § 5-1-110(d) (1) (B) (Repl. 1997) (authorizing separate convictions and sentences for murder in the first degree and any felonies utilized as underlying felonies for the murder).

Affirmed.

HART and VAUGHT, JJ., agree.